



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 3368-02
27 August 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: CAPT. [REDACTED] USMC [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 2 Apr 02 w/attachment
(2) HQMC JAM4 memo dtd 4 Jun 02
(3) HQMC MMER memo dtd 21 Jun 02
(4) HQMC MMPR memo dtd 15 Jul 02
(5) HQMC MMOA-4 memo dtd 13 Aug 02
(6) Subject's ltrs dtd 23 Jul and 1 Aug 02
(7) Subject's naval record

1. Pursuant to reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing the fitness reports for 7 August 2000 to 7 April 2001 and 1 August to 13 September 2001, copies of which are in enclosure (1) at Tabs A and B, respectively. He also requested removing all documentation of his nonjudicial punishment (NJP) of 19 June 2001 and related material, including the document dated 9 November 2001 concerning termination of administrative separation proceedings in his case, copies of which are in enclosure (1) at Tabs C and D, respectively. He further impliedly requested removing his failure of selection by the Fiscal Year (FY) 2003 Major Selection Board, so as to be considered by the selection board next convened to consider officers of his category for promotion to major as an officer who has not failed of selection to that grade. Finally, he requested a special selection board (SSB).

2. The Board, consisting of Messrs. Agresti, McBride and Shy, reviewed Petitioner's allegations of error and injustice on 21 August 2002, and pursuant to its regulations, determined that the limited corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. On 15 November 2000, Petitioner received a nonpunitive letter of reprimand for a fraternization incident. On 14 February 2000, his reporting senior's wife received an e-mail with a pornographic attachment, which was sent from Petitioner's government computer. On 6 April 2001, he was relieved of all duties. On 7 April 2001, he was transferred. The first contested fitness report, for 7 August 2000 to 2 April 2001, was submitted on the occasion of his transfer. It contains no adverse marks or comments.

c. On 19 June 2001, Petitioner was found guilty at NJP of dereliction of duty involving the e-mail incident. His NJP appeals were denied on 21 August and 13 September 2001. The second contested fitness report, for 1 August to 13 September 2001, documents the NJP. On the basis of the alleged misconduct for which Petitioner received the NJP, he was considered for administrative separation; however, as the contested document of 9 November 2001 shows, administrative separation proceedings in his case were terminated.

d. The only contested item considered by the FY 2003 Major Selection Board, which convened on 30 October 2001, was the fitness report for 7 August 2000 to 7 April 2001.

e. In correspondence at enclosure (2), the Headquarters Marine Corps (HQMC) Military Law Branch, Judge Advocate Division (JAM4), the office having cognizance over the subject matter of Petitioner's request to remove the NJP and directly related items, has commented to the effect that this request has merit and warrants favorable action. JAM4 states "...one might conclude that [the fitness report for 7 August 2000 to 7 April 2001] was unfairly influenced by the allegation [that Petitioner sent the e-mail, of which he was ultimately found not guilty]."

f. In correspondence attached as enclosure (3), the HQMC Performance Evaluation Review Branch, Personnel Management Division, Manpower and Reserve Affairs Department (MMER) has commented to the effect that if Petitioner's NJP is removed, they support removing the fitness report for 1 August to 13 September 2001, which documents the NJP; they state that once removal of the NJP is directed, "the Performance Evaluation Review Board (PERB) can take action relative to removing the report." However, they conclude the 7 August 2000 to 7 April 2001 report should stand, stating "...we cannot conclude that [the fitness report for 7 August 2000 to 7 April 2001] was unduly influenced by any allegations." The PERB itself has not considered Petitioner's case at all.

g. In correspondence attached as enclosure (4), the HQMC Promotion Branch (MMPR), the office having cognizance over Petitioner's request for an SSB, states that the NJP was not in his record for the FY 2003 Major Selection Board, and that he has not exhausted his administrative remedies.

h. In enclosure (5), the HQMC Officer Counseling and Evaluation Section, Personnel Management Division (MMAA-4), has commented to the effect that Petitioner's failure by the FY 2003 Major Selection Board should be removed, if the NJP and the reviewing officer comments and marks in the fitness report for 7 August 2000 to 7 April 2001 are removed.

i. In his two nearly identical letters at enclosure (6), Petitioner contends that because of the adverse action pending against him when the FY 2003 Major Selection Board met, he would have been removed from promotion consideration; that he has exhausted his administrative remedies regarding an SSB; and that he must have an SSB to have justice.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosures (2) and (3), the Board finds an injustice warranting limited relief, specifically, removal of the NJP and the documentation of the administrative separation proceedings.

The Board agrees with the advisory opinion from JAM4 in concluding that Petitioner's NJP and the administrative separation documentation should be removed. They find that the PERB should consider his request to remove the fitness report for 1 August to 13 September 2001, which documents the NJP, in light of this Board's action directing removal of the NJP.

The Board agrees with MMER in finding the fitness report for 7 August 2000 to 7 April 2001 should stand. They particularly note that a fraternization incident occurred during the reporting period, and that the report contains nothing adverse. Notwithstanding their decision to deny Petitioner's request to remove this report, they find that the PERB should consider this request as well, in light of this Board's action directing removal of the NJP. They note the PERB, as an independent administrative body, could find this request has merit, particularly in view of the JAM4 comment that one might conclude this report was unfairly influenced by a charge of which Petitioner was ultimately found not guilty.

The Board finds that Petitioner's failure by the FY 2003 Major Selection Board should stand as well, because the fitness report for 7 August 2000 to 7 April 2001 was properly considered by the promotion board; the other contested matters were not seen; and Petitioner was not removed from consideration, but rather failed of selection.

Since the Board finds that Petitioner's failure by the FY 2003 Major Selection Board stands, they have no grounds for granting an SSB.

In view of the above, the Board directs the following limited corrective action.

RECOMMENDATION:

- a. That Petitioner's record be corrected by removing all documentation of or reference to his NJP of 19 June 2001 and his administrative separation proceedings whose termination was announced by correspondence of 9 November 2001.
- b. That the HQMC PERB consider Petitioner's requests to remove the fitness reports for 7 August 2000 to 7 April 2001 and 1 August to 13 September 2001 in light of this

Board's action, at recommendation a above, directing removal of the NJP documented in the fitness report for 1 August to 13 September 2001.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

e. That Petitioner's requests to remove the fitness report for 7 August 2000 to 7 April 2001, remove his failure by the FY 2003 Major Selection Board, and grant him an SSB be denied.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

Jonathan S. Ruskin

ROBERT D. ZSALMAN
Recorder

JONATHAN S. RUSKIN
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

W. Dean Pfeiffer
W. DEAN PFEIFFER
Executive Director



3368-02

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JSR/BJG
Docket No: 3368-02
28 August 2002

From: Executive Director, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: AMENDED RECOMMENDATION IN THE CASE OF [REDACTED]

Encl: (1) BCNR rept in Subject's case dtd 27 Aug 02 less encls

1. Enclosure (1) was forwarded for your action.
2. In order to ensure proper implementation, the Board's "RECOMMENDATION" at enclosure (1) is hereby amended to read as follows:

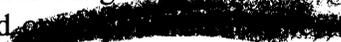
a. That Petitioner's record be corrected by removing all documentation of or reference to his NJP of 19 June 2001 and his administrative separation proceedings whose termination was announced by correspondence of 9 November 2001. In this connection, his "DC" fitness report for 1 August to 13 September 2001, signed by Lieutenant [REDACTED] JSMC, dated 10 October 2001, submitted for the purpose of documenting the NJP, is to be amended as follows:

- (1) Section A, item 5.a (Adverse): Remove "X."
- (2) Section A, item 6.c (Disciplinary Action): Remove "X."
- (3) Section I (Directed and Additional Comments): Remove the following:
 - (a) - MRO rec'd NJP from CG, 4th MAW dtd 25 June 01 and was found guilty of Article 92 charge. His appeal to COMMARFORRES was denied on 13 Sept 01, precipitating this DC report.
 - (b) Sect A, Item 6c: MRO Rec'd NJP of CG, 4th MAW dtd 25 June 01.
- (4) Section J (Certification), item 2: Remove "X" indicating "I have attached a statement," signature of Marine reported on [REDACTED] and date (2001 10 10) of signature of Marine reported on.

(5) Section K (Reviewing Officer Comments):

(a) Item 4 (Reviewing Officer Comments): Remove the following:

I believe this officer stumbled. But, he picked himself up and should ultimately be promoted.

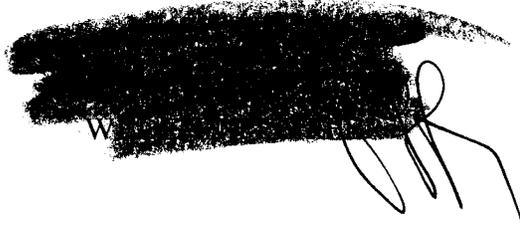
(b) Item 6: Remove "X" indicating "I have attached a statement," signature of Marine reported  and date (2001 10 16) of signature of Marine reported on.

(6) Section L (Addendum Page): Remove "X" indicating "Yes."

(7) Remove the two-page Addendum Page reflecting the MRO statement.

(8) Remove the Addendum Page reflecting the 3rd Officer sighting.

3. The regulations approved by the Secretary of the Navy require that the naval record of Subject be corrected, where appropriate, in accordance with the recommendation of the Board.



Copy to:
Capt Noble



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

3368-02

IN REPLY REFER TO:

1070

JAM4

04 JUN 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO CAPTAIN [REDACTED] SMC

1. We are asked to provide an opinion on Petitioner's request for the removal from his service record book (SRB) and official military personnel file (OMPF) of all entries related to the non-judicial punishment (NJP) he received on 25 June 2001. Once this NJP is removed, Petitioner also requests that a special promotion board be convened to consider his selection to the grade of major.

2. We recommend that Petitioner's request for relief be granted in part. Our analysis follows.

3. Background

a. Allegations of misconduct arose after the wife of Petitioner's commanding officer received pornographic images from Petitioner's Government electronic mail (E-mail) account. After a preliminary inquiry, Petitioner was notified that the Commanding General (CG), 4th Marine Aircraft Wing (MAW), intended to hold NJP proceedings. Petitioner accepted, and the NJP was held on 25 June 2001. At the NJP, Petitioner pleaded not guilty. Petitioner presented extensive evidence that tended to establish that he did not send the E-mail in question, along with other evidence of good military character. The CG, 4th MAW, found Petitioner not guilty of all charges dealing with accessing, storing, displaying or distributing pornography on his Government computer or E-mail account. The CG, 4th MAW, did, however, find Petitioner guilty of dereliction of duty and awarded him a Letter of Censure. The factual and legal bases for the allegation of dereliction of duty for which Petitioner was punished are the subject matter of our analysis.

b. The allegation of dereliction of duty for which Petitioner was punished read:

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
 ICO CAPTAIN [REDACTED] USMC

In that Captain [REDACTED] USMC, Marine Wing Support Squadron 474 (-), Marine Wing Support Group 47, 4th Marine Aircraft Wing, Marine Forces Reserve, while on active duty, who knew of his duties as the Officer-in-Charge (OIC, MWSS-474(-)), at Naval Air Station, Joint Reserve Base, Willow Grove, Pennsylvania, or the surrounding community, from about January to February 2001, was derelict in the performance of those duties in that he willfully failed to properly use a U.S. Government computer and its network for official or authorized purposes only, as it was his duty to do, by accessing, storing, displaying, or distributing pornographic images to subordinate personnel or civilian dependent family members of superior servicemembers.

c. At the NJP hearing, the CG found Petitioner guilty of the specification above without any exception or substitution of language. Nevertheless, the record clearly reflects that the CG found Petitioner not guilty of all allegations of accessing, storing, displaying or distributing pornography on his Government computer or E-mail account. After several factually inaccurate and unfairly prejudicial characterizations by the command about what actually took place at NJP, the command's current explanation is that the CG found Petitioner guilty of dereliction of duty by negligently¹ permitting other Marine personnel to use his password and access his Government computer and Government E-mail account.² In the latest version of the Letter of Censure, the CG, 4th MAW, commented that Petitioner's dereliction permitted others to access, download, and store pornographic materials on his Government computer, and allowed unknown individuals to send pornographic materials from his Government E-mail account.

4. Analysis. Material legal error resulting in injustice occurred in the imposition of Petitioner's NJP. First, the specification of which Petitioner was found guilty fails to properly allege an offense under the UCMJ. Second, the CG committed error by punishing Petitioner for an offense of which he was not notified. Third, the report of NJP and related

¹ Paragraph 3 of the Letter of Censure dated 27 August 2001 (Tab P of Petitioner's request) reads "negligently, if not willfully," which we take to mean that while the CG found that Petitioner was negligent, he suspected, but was not prepared to formally find, a willful dereliction.

² See Paragraph 2(a)(1) of the Letter of Censure dated 27 August 2001 (Tab P of Petitioner's request).

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO CAPTAIN [REDACTED] 156 [REDACTED] USMC

papers do not comply with regulations and they do not fairly or accurately reflect Petitioner's conduct.

a. The specification fails to properly allege an offense under the UCMJ.

(1) The specification alleges that Petitioner was derelict in his duty to " . . . properly use a U.S. Government computer and its network for official or authorized purposes only" This language fails to enumerate the particular duty Petitioner had, but negligently failed to perform. Rather, by use of the term "authorized" in this context, the specification seems to impose a generalized duty to obey the law. This is legal error.

(2) Paragraph 16c(3)(c) of the MCM defines "derelict" as follows:

(c) *Derelict.* A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse.³

(3) Military Courts have recognized three possible bases for dereliction of duty: (1) when a person willfully fails to perform that person's duties; (2) when a person negligently fails to perform that person's duties; and (3) when a person performs that person's duties in a culpably inefficient manner. The first two bases center on the concept of failure to perform, which connotes inaction, nonperformance or nonfeasance of a

³ Dereliction is defined as "deliberate or conscious neglect; negligence." The Random House College Dictionary, Revised Ed., at 358.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO CAPTAIN [REDACTED] USMC

duty. Such nonperformance can either be deliberate or negligent, with the former carrying a more severe maximum punishment because it involves a flaunting of authority. The third basis involves some performance, but performance that is faulty without reasonable cause or excuse. Thus, to be guilty of dereliction of duty under Article 92, UCMJ, the service member may be held accountable for either nonperformance or faulty performance of duty.⁴

(4) In United States v. [REDACTED] the accused was convicted of three specifications of willful dereliction of duty "in that he willfully conducted" breast and pelvic examinations "which he was not authorized to do." These specifications, instead of alleging nonperformance or faulty performance of a duty, alleged that the accused committed acts beyond the scope of his duties, i.e., breast and pelvic examinations of females. The evidence indicated that the accused did not fail to perform his essential duties in conducting examinations of patients or that he performed his duties in a culpably inefficient manner, but rather that he deliberately exceeded what he was permitted to do by committing indecent assaults and maltreating patients. The court wrote, "We do not believe that the offense of dereliction of duty was ever intended to be used so broadly so as to encompass acts committed which go beyond the scope of one's duties. We are aware of no case, and counsel have not cited one to us, which has ever upheld a conviction of dereliction of duty under such a theory. Moreover, there are alternatives that could be used to charge crimes for exceeding one's authority, such as disobedience of an order. Therefore, we will set aside the guilty findings of the . . . charge."⁵

(5) Thus, defining Petitioner's duty as a duty to use his computer and its network for authorized purposes only, was error. Exceeding authorized use of a Government computer by viewing or sending pornography is not in itself a dereliction of one's duty (but may constitute a violation or disobedience of an order).

b. The CG committed error by punishing Petitioner for an offense of which he was not notified.

⁴ See United States v. [REDACTED] 44 M.J. 603, 610 (N.M.C.C.A. 1996).

⁵ Id.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO CAPTAIN [REDACTED] USMC

(1) The Manual for Courts-Martial (MCM), Part V, Paragraph 4(a)(2) requires that, prior to the imposition of NJP, the NJP authority must notify the servicemember of the allegation(s) by providing "a statement describing the alleged offenses - including the article of the code - which the member is alleged to have committed."

(2) The specification at issue alleged dereliction of Petitioner's duty to "properly use a U.S. Government computer and its network for official or authorized purposes only" by "accessing, storing, displaying, or distributing pornographic images to subordinate personnel or civilian dependent family members of superior servicemembers."

(3) The CG apparently found Petitioner guilty of dereliction of a different duty, namely, a duty to safeguard his computer password. The CG also found that Petitioner was derelict in this newly described duty by committing entirely different acts. This was material error. The requirement to notify service members of the alleged offenses, prior to imposition of NJP, precludes substitution of this kind, which created an entirely different offense against which Petitioner was not prepared to defend.⁶

c. The report of NJP and related papers do not comply with regulations and they do not fairly or accurately reflect Petitioner's conduct.

(1) The report of NJP, dated 3 October 2001, falsely asserts that Petitioner sent the E-mail containing pornography to his commanding officer's wife. The report also misleads its readers to believe that SNO wrongfully accessed, stored, displayed or distributed pornography on his Government computer. The report then inappropriately includes references to an unrelated allegation of fraternization, and falsely suggests that Petitioner was guilty of this misconduct as well. Finally,

⁶ It is noteworthy that the command's description of Petitioner's duty and the underlying derelict acts changed often and over time. Notification that fairly apprises a service member of the allegations against him is required so that he may decide whether to accept or refuse NJP and prepare his defense (if any). Notification is not satisfied by a *post hoc* rationalization. Moreover, Petitioner's NJP appeal makes clear that when offered his first opportunity to address the allegation that he was derelict in his duty to safeguard his computer password, Petitioner presented numerous relevant facts and cogent arguments in response.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO CAPTAIN [REDACTED] USMC

the report conveniently omits any reference to the action taken on 27 August 2001 (as the result of appeal) to correct these and other inaccuracies contained in earlier versions of the Letter of Censure.

(2) Due to the numerous inaccuracies contained within the report of NJP and related papers, we counsel that the presumption of regularity of the official actions of public officers should not be applied in this case.

5. We have reviewed Petitioner's OMPF and determined that no adverse information *directly* concerning this incident was before the Fiscal Year 2003 Major USMC Selection Board, which convened on 30 October 2001.

a. The fitness report covering the time period from 1 August 2001 to 13 September 2001, which specifically addresses Petitioner's NJP, was included in Petitioner's OMPF on 13 November 2001.⁷

b. The fitness report covering the time period from 7 August 2000 to 7 April 2001 was signed by the reviewing officer on 19 May 2001, about 1 month after Petitioner's relief for cause. This report was before the Major selection board. Petitioner's relief for cause was precipitated by the receipt of pornographic material by the commanding officer's wife, an offense of which Petitioner was ultimately found not guilty. Although the report is silent about this incident, one might conclude that this report was unfairly influenced by the allegation. This, however, is a judgment beyond the purview of this office.

6. Conclusion. Accordingly, we recommend that the requested relief be granted in part. The NJP and all related papers should be removed from Petitioner's records. We offer no opinion regarding whether Petitioner ought to be granted a special selection board.

[REDACTED]

Head, Military Law Branch
Judge Advocate Division

⁷ Per phone conversation with Manpower Management Support Branch.



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

3368-02

IN REPLY REFER TO:
1610
MMER
21 Jun 02

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF CAPTAIN [REDACTED], USMC

Ref: (a) Your ltr [REDACTED] 08-02 of 11 Jun 02

1. In the referenced letter, we have been asked to comment on what action should be taken concerning subject's fitness reports for the periods 1 August to 13 September 2001 and/or 7 August 2000 to 7 April 2001 20 December 2000 to 1 February 2001 if the nonjudicial punishment (NJP) recorded therein should be removed.

2. Clearly, the only item of substance in the "not observed" fitness report for the period 010801 to 090913 (DC) concerns the imposition of NJP. If action by BCNR results in removing the NJP, then elimination of the fitness report is warranted.

3. Since the NJP is still present in subject's record, it would be premature at this time for this Headquarters to initiate action to eliminate the fitness report. However, once BCNR directs removal of the NJP, the Performance Evaluation Review Board (PERB) can take action relative to removing the report.

4. Notwithstanding the documentation included with subject's Application for Correction of Military Record or the Advisory Opinion furnished by the Staff Judge Advocate to the Commandant, we cannot conclude that subject's fitness report for the period 000807 to 010407 was unduly influenced by any allegations. We also find nothing to show precisely how or why Captain [REDACTED] rated more than what has been recorded in that evaluation.

[REDACTED]

Head, Performance Evaluation
Review Branch
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the
Commandant of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
MANPOWER AND RESERVE AFFAIRS DEPARTMENT
HARRY LEE HALL, 17 LEJEUNE ROAD
QUANTICO, VIRGINIA 22134-5104

IN REPLY REFER TO
1412/2
MMPR
JUL 15 2002

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF CAPTAIN [REDACTED]
[REDACTED] USMC

- Ref: (a) MMER Route Sheet of 21 Jun 02
- (b) BCNR memo dated 04 Jun 02
- (c) SECNAVINST 1401.1B
- (d) MCO P1400.31B

1. Reference (a) requested an advisory opinion in the case of Captain [REDACTED] Captain [REDACTED] requesting the removal of Non Judicial Punishment (NJP) comments from a fitness report for the period of 010801 to 010913. Captain [REDACTED] is also requesting a special selection board.

2. The following facts are germane to this case:

a. Captain [REDACTED] was eligible and not selected as an in zone officer on the FY03 USMC Major Promotion Selection Board, which convened on 011030. He is eligible as an above zone officer for the FY04 USMC Major Promotion Selection Board, which is scheduled to convene on 020904.

b. Per reference (b), Captain [REDACTED] fitness report for the period of 010801 to 010913 was not placed in Captain [REDACTED] Official Military Personnel File until 011113. Thus, the FY03 USMC Major Promotion Selection Board that convened on 011030 never reviewed this report, which specifically addresses the NJP of concern.

c. References (c) and (d) provide guidance on the steps an officer must take to request a SSB. Captain [REDACTED] has not exhausted these administrative remedies. If he desires an SSB he should follow the steps outlined in references (c) and (d).

3. Promotion Branch defers comment on the removal of NJP comments to the Personnel Management Support Branch.

Subj: BCNR APPLICATION IN THE CASE OF CAPTAIN [REDACTED]
[REDACTED] USMC

4. The point of contact in this matter is [REDACTED]
[REDACTED]

[REDACTED]

Colonel, U. S. Marine Corps
Head, Promotion Branch



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

3368-02

IN REPLY REFER TO:

1600
MMAA-4
13 Aug 02

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR PETITION FOR CAPTAIN MATTHEW [REDACTED]
[REDACTED] USMC

Ref: (a) BCNR Request for Advisory Opinion in the case of
Captain [REDACTED] USMC
of 8 Aug 02
(b) BCNR memo AEG 3368-02 of 11 Jun 02

1. Recommend approval of Captain [REDACTED] implied request for removal of his failure of selection only if the NJP and the Reviewing Officer comments and marks on the report from 000807 to 010407 are removed from his record.
2. Per reference (a), we reviewed Captain [REDACTED] record and petition. Captain [REDACTED] led selection on the FY03 USMC Major Selection Board.
3. Per reference (b), it is extremely unlikely that the report from 010801 to 010913 was before the board and therefore it is not material to the removal of Captain [REDACTED] failure of selection.
4. In our opinion, the Reviewing Officer comments and marks on the report from 000807 to 010407 contains competitive concerns that may have contributed to the failure of selection. Removal of these comments and marks would increase the competitiveness of Captain [REDACTED] record. All of the prior reports in Captain [REDACTED] record were completed before to the incident that precipitated the NJP and therefore should not be influenced by the incident. With the comments and marks on the report from 000807 to 010407 removed, Captain [REDACTED] record still contains considerable competitive jeopardy in the following areas:

a. **Comments and [REDACTED]** The comments on the report from 990801 to 991211 are a competitive concern. When compared to the comments received by his peers being selected for promotion, "I'm still anticipating maturity of judgment in dealing with higher HQ" and "four of four as HQ I&I, seven of eight of all the Capt I&I's I review" remain a competitive concern. Additionally, the Reviewing Officer Comparative Assessment remains below his peers with zero marked below him and 12 marked above him.

Subj: BCNR PETITION FOR CAPTAIN MATTHEW [REDACTED]
[REDACTED] USMC

b. **Comments from** [REDACTED] The comments on the report from 991212 to 001001 are a competitive concern. When compared to the comments received by his peers being selected for promotion, "Has improved in personal relations with co-located commands" and "Undecided about future in the Corps" remain a competitive concern.

5. In summary, the removal of the Reviewing Officer comments and marks on the report from 000807 to 010407 would improve the competitiveness of Captain [REDACTED] record. Though we recognize his record contains other areas of competitive concern, we believe Captain [REDACTED] should be afforded the benefit of the doubt and recommend approval of his implied request for removal of his failure of selection if the NJP and the Reviewing Officer comments and marks on the report from 000807 to 010407 are removed from his record.

6. POC is [REDACTED]

[REDACTED]

Lieutenant Colonel, USMC
Head, Officer Counseling and
Evaluation Section
Personnel Management Division